# High Court judicial approval for joint drafting of family court consent orders

David Hodson OBE writes a Legal Briefing on the High Court judicial approval for joint drafting of family consent order.

## Legal Briefing

### Executive summary

The green light has now been given to lawyers and others to act for both parties in drafting consensual family court documents. In a judgment on 20 January 2020, Mr Justice Mostyn has given a Declaration that there is no conflict-of-interest for a leading online service to act for both parties in the drafting of a financial consent order under the terms of its business model. He has further held that doing so is neither a reserved legal activity nor a reserved instrument activity and therefore not a breach of the Legal Services Act.

Financial orders in the family court are very complex, technically precise and difficult to draft by non-lawyers. There has been demand for lawyers, mediators and others to be able to act for both parties in this drafting process. Previously there had been uncertainty whether it was possible due to conflict-of-interest.  In any event could it be undertaken by non-lawyers if it was a reserved activity for solicitors?  This was referred to the High Court for a Declaration.

The judgment resoundingly confirms that joint drafting of consent orders is possible and indeed necessary to provide access to justice. It looks ahead to when this process will be a matter for drafting by artificial intelligence. It is a crucial judgement for the legal profession, online service providers, and family justice.  It will very probably mean more joint applications for family court consent orders.  Practice by lawyers and the courts will change.  It should produce saving of costs

and less contentiousness and disputes.  Many clients will now expect this service to be available to them.

## Background

Amicable is one of the country's leading online family law services, helping couples jointly with their divorce, assisting in negotiating financial settlements and then drafting financial consent orders. Formed by Kate Daly and Pip Wilson in 2015, it had before this litigation already prepared over 200 financial consent orders, assisted in over 1000 divorces and been contacted by over 5000 people, obtaining the approval of courts around the country and SRA endorsement for their model. It has a sophisticated, computer driven process for the preparation of court forms, overseen by non-practicing certificate solicitors previously working in specialist London firms.  It provides top-quality information and other services for those going through separation and divorce through its website.

However, in summer 2019 a judge of the Bury St Edmunds Regional Centre had queried the joint drafting, with concerns about potential conflict-of-interest.  A sample case was referred to Mr. Justice Moor who listed the matter for a review, inviting the Queen's Proctor to intervene.

The actual case was the least contentious and the most obvious for joint drafting. A young couple married in August 2015 with no children and separated in December 2017 with no capital assets and each having their own income and who wanted a simple clean break financial order. They approached amicable for the joint preparation. Frustratingly for the couple, this was the case which went to the High Court at the hearing on 19 December 2019. The first step by Mr. Justice Mostyn was to approve their order and release them from further attendance at the hearing.

The Queen's Proctor was represented by Simon Murray and amicable was represented by Vikram Sachdeva QC, and by David Hodson OBE at The International Family Law Group LLP which acted pro bono, to support the firm's commitment to access to justice, to digital innovation and to the enterprising and important work of amicable.  The case name is *JK v MK* [2020] EWFC 2

## Context

Before dealing with these issues, it is crucial to understand why there is the demand for this service. It was identified by the judge in his judgment (clause 15 and numbers in this note relate to the judgment itself).  The consequence of the near total withdrawal of legal aid from private family law proceedings in 2013 has effectively disenfranchised many people from access to legal

representation and justice. This is found in the many litigants in person now before the family courts. But it is also found in the difficulty in drafting complex family court documents, particularly the final financial settlement. Although now in standard precedent form, coincidently drafted by Mr. Justice Mostyn under the auspices of the then President, Sir James Munby, it is still a multifaceted document with many technically worded, parallel clauses to be used in a variety of situations. It is exceptionally hard for any without legal training or expertise to draft reliably and competently. Indeed a number of consent orders drafted by lawyers are rejected by the courts for technical and procedural defects.  Yet many act in person and reach settlements direct, through mediation or other means and then need to prepare the draft consent order. They need specialist assistance. Understandably they do not regard themselves in any dispute, conflict or similar and are keen to have one lawyer or organisation prepare the document.  Sometimes they seek that assistance from online services.

This is the service which amicable has provided very successfully to very many couples. In 2018 it had been challenged by the Bradford Divorce Regional Centre and was referred to the SRA, who in an email of 8 December 2018 fully supported the amicable model as an example of innovative working and not breaching regulatory requirements (15).  Nevertheless it was challenged again and this time heard by a High Court judge after the Queen's Proctor's investigation and representations.  This time amicable were able to put their position with the benefit of a specialist regulatory QC and specialist family law solicitors so that there could be no further doubt about this service hereafter.

There were two separate elements namely conflict-of-interest and whether this was reserved activities which could only be undertaken by solicitors.

## Conflict-of-interest

English common law is keenly alert to conflict-of-interest even where there is an apparent agreement. Is it a conflict to act for both parties in drawing up a consent order?  This was the first issue before the court (17). Both Counsel agreed that this concern was unfounded (17). Specifically, the Queen's Proctor was satisfied that no conflict of interest arises (17). The judge recorded that the joint instruction of solicitors happens frequently in family cases e.g. on implementation.

He said that it is trite that where a solicitor acts for a client, a fiduciary relationship arises. Where acting for two clients, the solicitor must not act with the intention of furthering the interests of one

client to the prejudice of others. Thus rule 6.2 of the SRA Code of Conduct allows solicitors to act jointly where there is a substantially common interest, or where they are competing for the same objective (19). He thought an online service such as amicable were probably under a similar fiduciary duty.

He went on to refer to the system created by amicable of red flags which might give rise to a conflict. This would include domestic violence incorporating psychological abuse, alcoholism and mental health issues, where one has already instructed a lawyer, one party is unwilling to negotiate, non-disclosed assets and similar. In the circumstances amicable would decline to accept the case and refer to lawyers. The judge found in his judgment that the existence of these red flags entirely neutralized the risk of any conflict-of-interest arising (20). In the expectation that solicitors will now more often act for both parties, it will be essential to have these red flags clearly known and set out.

Accordingly, the judge made a Declaration that amicable was not in a conflict-of-interest in acting for both parties under the terms of their business model (21).

## Reserved activities

This second issue arose after the initial referral but was the more complex. Under the Legal Services Act 2007 including its predecessor legislation, certain steps can only be undertaken by solicitors.

The first is so-called reserved legal activity which includes conduct of litigation, section 12.1.2 of the 2007 Act. If this included drafting consent orders, amicable would be in breach of the law and the directors potentially at risk of imprisonment. Case law indicates that the giving of legal advice by a nonlawyer is not necessarily prohibited (26). Indeed, the judge highlighted that it would be absurd e.g. if someone's brother had gone through a divorce and helped complete the Form E and filed it at the court or someone asked an accountant for assistance, then the brother or the accountant would technically be in breach, including being liable to a spell in prison (27). This would be an absurd outcome. The judge was satisfied that nothing done by amicable breached this provision.

The second is so-called reserved instrument activities (32). The judge found the context was preparation of documents dealing with real or personal property (34). The mischief was '*preparing*' , a concept which is vague and uncertain and has certainly changed with the different ways of

working of the legal profession over the years.  But if the definition was taken literally, virtually every document which amicable and similar organisations helped a couple to prepare would fall foul of the legislation.  It would be not only the consent order, but the accompanying D81 summary of financial information. This would be an absurd over-literal approach with the judge cross referring to the colourful illustration from the moral philosophy on contract law of the 19th century (36). The judge found that the process of preparing divorce petitions had changed dramatically over the last few decades. Whereas previously it had been sometimes settled by Counsel, it was now a banal affair, a tick box exercise, offered online by the government (38). The old case law emphasising the involvement of filing of documents was no longer good (39).

But the judge said that if he was wrong about this, there might not in any event have been any preparation by amicable given that the computer programme directly received the input from the parties and auto populated the draft order. Preparation in a non-digital era has now changed. A representative of amicable was involved in drafting to some extent. As the judge pointed out, the day will not be long arriving when artificial intelligence undertakes this checking of the drafting. When that day arrives, it could be said that nobody at amicable had prepared the documents (40).

Then in a crucial paragraph for nonlawyer organisations providing this service, he said that it is his clear view that an unqualified person will not have prepared a document for use in legal proceedings unless they had been a major contributor in the drafting or had filed the document at the court. He noted that in the amicable model, all of the filing is done by the parties themselves which he felt was a crucial, key distinction (41). For this further reason he was satisfied that generating the documents by amicable in their model did not violate, or create a breach, of the Legal Services Act (42). He said the Declarations in the case related only to amicable and other online divorce facilitators could only rely on them if their business model was virtually indistinguishable from amicable (46).

## Conclusion

This is an important judgment for the benefit of online service providers and for the legal profession, as well as ancillary professionals such as mediators.

For solicitors, there is no longer the undue anxiety of an inherent conflict-of-interest in acting for both parties in the drafting of family law documents, on a consensual basis, provided it is not with the intention of furthering the interests of one client to the prejudice of the other. A system of red flags to identify potential conflicts of interest neutralises the risk of a conflict arising. It might now

be prudent for the family law solicitors profession to identify collaboratively those red flags in a cautious but not unduly restrictive fashion. For non-lawyers including online services, very probably also in a formal fiduciary duty, the same position prevails. There will now be more lawyers and others helping members of the public jointly to prepare family court documents in a variety of situations. Indeed, with changes hopefully soon to divorce, with the opportunity of joint divorce petitions, it must be right and appropriate for one lawyer or organisation to act for both in the preparation of the joint petition. This High Court judgment removes unnecessary anxieties about conflicts of joint acting. Huge care and caution is still needed but opportunities now exist. The public will be the beneficiaries.

For non-solicitor organisations including online service providers, it is declared that their activities, based on the amicable business model, do not breach the regulatory requirements of reserved legal activities with the caveats that they are not involved in the filing of documents nor as major contributors to the drafting. It will be for each organisation to ensure that their business model follows that approved by the court and that they do not breach either of the specific requirements. It will be a boost for the leading online service providers such as amicable providing affordable, yet high quality drafting and other family law services.

The timing of this judgment has a certain irony, coming only 10 days before we leave the European Union. Across the EU, family lawyers routinely act for both parties in the preparation of marital agreements, the division of marital property and preparation of family court orders. They have been astounded that on this side of the channel we have shrunk away into our anxieties about conflicts of interest. This judgment brings us closer to the European civil law experience, yet maintaining the common law importance of independent legal advice where there is genuinely a difference between the parties that needs advice, representation and resolving.

A copy of the judgement online can be found here

Prof David Hodson OBE MCIArb
david.hodson@iflg.uk.com
The International Family Law Group LLP
www.iflg.uk.com